

[ I ]

Alexander Small, Administrator of Mary his late Wife deceased, } Appellant.  
who was the only Daughter of Peter Wing the Elder, deceased,

Richard Wing, second Son and surviving Executor of the said Peter }  
Wing the Elder, and also Executor of Peter Wing the Younger, } Respondents:  
and John Wing the youngest Son of the said Peter Wing the Elder, }

The APPELLANT's CASE.

Will 23d  
August, 1695.

Devise to  
Trustees.

Devise to Re-  
spondent  
Richard.

Devise to Re-  
spondent John  
Respondents  
not to enter un-  
til Testator's  
Debts and 1000l.  
to his Daughter  
were paid.  
Devise of  
1000l. to Ap-  
pellant's late  
Wife, out of  
Testator's  
Real Estate.

And of 1000l.  
more out of  
his Personal  
Estate.

Testator's  
Death 30 April,  
1696.

12 July, 1706.

Will Filed in  
Chancery Term,  
1706.

After, the  
Son's Death,  
11 June 1711.

Decree,  
11 June 1715.

THE said Peter Wing the Elder made his Will, and thereby gave to his eldest Son Peter Wing the younger, all his the said Testator's Interest in the Brew-house, Utensils, and Stock in Trade therein mentioned, and also the Rectory of North Stoake, and directed, that the said Peter the Son, during the Term he should hold the said Brew-house, (being then about four Years to come) should pay to the Executors of the said Testator 250l. per Ann. And Devise to his Executors all the Rents, Issues, and Profits, of all his other Messuages or Tenements, Rectories, Lands and Hereditaments therein after mentioned and Devise; In Trust that the said Executors should therewith, and with the said 250l. per Ann. Raise and Pay all the Testator's Debts; But that if his Executors should neglect or refuse to Receive and Pay the said 250l. per Ann. or the Profits of the said Messuages and Premises, or should receive and not duly apply the same towards Payment of his Debts, then the Power thereby given them to receive and pay the same, should cease: And then he appointed Robert and Peter Sayer, Robert Dorrel, and Richard Spooner, to be his Trustees, to receive the said 250l. per Ann. and the Profits of the said Messuages and Premises, for the Payment of his Debts, until the same and the Legacies thereby bequeathed to his said Daughter Mary, the Appellant's said late Wife, should be fully raised and satisfy'd.

And he thereby gave to the Respondent Richard Wing, and his Heirs, Executors and Assigns, the Rectory of North Morton, and all his other Messuages, Lands and Hereditaments in North Morton and South Morton, subject to the Payment of 25l. per Ann. to Mary, then Wife of the Testator, during her Life, to commence after the Payment of the Testator's Debts.

And he gave to the Respondent John Wing, his Heirs, Executors and Assigns, the Messuage and Malt-houses, then in the Testator's Possession, and all other his Messuages, Lands and Hereditaments, in Brightwell, Mackney, and Wallingford, and declared it to be his Will and Meaning, that neither of his said Sons Peter, Richard, or John, should enter on, or receive to their own Use, the Rents and Profits of the Premises to them respectively devised, or any Part thereof, until all the Testator's Debts should be paid, save that his said Son Peter should enjoy the said Brew-house to his own Use, paying the said 250l. per Ann. as aforesaid; but that when and so soon as all his Debts should be paid, and 1000l. to the Appellant's late Wife, which he thereby gave to her, to be also raised and paid out of the Rents and Profits of the Estates Devise to his said three Sons as aforesaid, should be fully paid and satisfied (with the Payment of which said 1000l. over and above the other 1000l. herein after-mentioned, the Testator thereby charged to be raised and paid to his said Daughter, for and towards her Portion, out of the Rents, Issues and Profits of the Estates thereby before given to his said three Sons) his said three Sons might Enter on and enjoy the Estates so to them Devise as aforesaid, and not before. And to the End that the 1000l. thereby given to his said Daughter should be raised and paid to her, according to his said Will, he thereby appointed his said Trustees to receive the Rents, Issues and Profits of the Premises so Devise to his said three Sons severally, as aforesaid, and to pay over the same to his said Daughter; and that until his Debts, and the said 1000l. should be paid, his Trustees should Let and Set the Premises for the best Rents, for raising and paying his Debts, and the said Legacy of 1000l. Provided, that if either or any of his said Sons, should raise and pay such Sums as the Trustees or the Survivor should adjudge to be his or their Proportion of the Debts and Legacies, then the Premises to him or them Devise should be exempted, and such Son or Sons should enter and receive the Profits; and appointed his said Wife and the Respondent Richard to be his Executors, and bequeath'd unto them all his personal Estate, and directed that his said Executors thereout should raise and pay to his said Daughter the further Sum of 1000l. (over and above the said other Sum of 1000l.) to be paid to her by his said Executors, after his said Debts should be paid, but not before; it being his Will, that his said Executors, and his said Son John, and Daughter Mary, should live together in the House and Malt-house wherein the Testator then lived: And he directed, that his Executors should provide all Necessaries for his said Son and Daughter, until his Debts should be paid.

The Testator dyed, and his said Executors proved his said Will, and the Respondent Richard possessed his Personal Estate, and received the said 250l. per Ann. from his Brother Peter for four Years, and the said Peter the Son entred on the Estates to him devised, and Richard entred on the Residue of the said Real Estates, and received the Profits thereof.

The Appellant intermarry'd with the said Mary his late Wife, whereby he became intitled to the said Legacies of 1000l. and 1000l. with Interest; but the said Testator's Widow and Sons refusing to pay the same,

The Appellant and his said late Wife exhibited their Bill in the Court of Chancery, against the said Mary Wing, Peter Wing the Son, and the Respondents, to have an Account of the Testator's Real and Personal Estates; and that the said Legacies of 1000l. and 1000l. with Interest might be raised, and paid; and the Defendants to the said Bill put in their Answers thereunto. And Peter Wing, the Son, afterwards dying, and the Respondent Richard being his Executor, the then Plaintiffs exhibited their Bill of Revivor, and Supplemental Bill, against the said Respondent; but before the said Cause was heard, the Appellant's said late Wife dyed, leaving two Daughters, who are now living, and the Appellant having taken out Administration to his said Wife, became intitled to the said Legacies of 1000l. and 1000l. and Interest, and afterwards revived the Suit.

The Cause was heard before the then Master of the Rolls, who declared the Will of the said Peter the Father to be well proved, and that the said Peter the Son came in as a Purchaser of the said Brew-house, upon his paying the said 250l. for Four Years. And it was decreed, that Mr. Orlebar, the



the then Master, should take an Account of the Personal Estate of the said *Peter Wing* the Father, and of the said 250*l. per Annum* for Four Years, and of the Profits of the Estates devised to the Sons, subject to the Payment of the Testator's Debts: And also an Account of the Testator's Debts and Legacies, and to state what the same severally amounted unto. And the said Master was to Tax all the Parties their Costs of Suit, which were to be paid them out of the Testator's Estate; and the Consideration of Interest for the Legacies, devised to the Appellant's said late Wife, and touching her Maintenance; and a Sale of the Estates subjected to the Payment of the said Debts and Legacies, in case there should not be other Assets sufficient to pay the same; and all other proper Directions were thereby reserved, until after the said Master should have made his Report; and the said Decree was soon after Signed and Inrolled.

Report, The Master made his Report, and certified, That the Testator's Personal Estate amounted to 22 July 1720. 1233*l. 1s.* and that he thought fit to charge the Respondent *Richard* therewith; and also with 1000*l.* by him received of his said Brother *Peter*, and which he was to pay at four yearly Payments, as afore-said; and that the Rents of the Testator's Real Estate, received by Respondents, from *Lady-Day* 1696, to *Lady-Day* 1718, (being then above 600*l. per Annum*) amounted to 11042*l. 3s.* of which the Respondent *Richard* had received 9850*l. 3s.* and the Respondent *John* 1192*l.* which Sum of 9850*l. 3s.* received by the Respondent *Richard*, being added to the Amount of the said Personal Estate, and to the 1000*l.* received by him of his said Brother *Peter*, the same amounted to 12083*l. 4s.* and that the Testator's Debts, at his Death, amounted to 7189*l. 9s. 5d.* and that the Respondents had paid in Discharge of several of the Testator's Debts, and the Interest thereof; and for Repairs, Taxes, and maintaining the Testator's Family to *Lady-Day*, 1718; and for the Maintenance of the Appellant's late Wife, until her Marriage (including the Arrears of Rent standing out at *Lady-Day*, 1718) 12734*l. 16s. 4d.* whereof he had allowed 11881*l. 19s. 11d. ½*, to the Respondent *Richard*, and the Remainder, being 852*l. 16s. 4d. ½*, to the Respondent *John*; so that there remained in the Respondent *Richard's* Hands, at *Lady-Day* 1718, 201*l. 4s. ½*, and in the Respondent *John's* Hands, 339*l. 3s. 7d. ½*; and that the Appellant Intermarried with his said late Wife, 12 July 1706; and that the said Legacies of 1000*l.* a-piece remained unpaid; and that there also remained unpaid to the Testator's Creditors 3026*l.* And that the said *Peter*, the Son, had been let into the Possession of the *North Stooke* Estate, by the Trustees; and that he received out of the Rents thereof, from *Lady-Day* 1696, to the Time of his Death, in June 1711, 2625*l.* And that the Respondent *John* had been in Possession of the Estate devised to him, being 114*l. per Annum*, ever since *Lady-Day* 1708. And that the Respondent *Richard* had paid 377*l. 19s. 2d.* for Interest of Monies borrowed by him to pay off the Testator's most pressing Creditors, and of which he craved an Allowance, but the Master did not think fit to determine whether the same ought to be allowed.

	<i>l.</i>	<i>s.</i>	<i>d.</i>
By this Report, the Respondents are allowed for the Maintenance of the Respondent <i>Richard</i> , and his two Servants, and for keeping two Horses, at 70 <i>l. per Ann.</i>	1540	0	0
And for the Maintenance of the Respondent <i>John</i> , at 30 <i>l. per Ann.</i>	660	0	0
And for the Maintenance of <i>Mary</i> , the Testator's Widow, at 25 <i>l. per Ann.</i>	550	0	0
And for the Maintenance of the Appellant's late Wife, until her Marriage, at 30 <i>l. per An.</i>	300	0	0
Total	3050	0	0

Order 16 Jan. 1720, to confirm Report, &c. The Respondents having taken Exceptions to the said Report; and among the rest, for that the Master had not allowed the said 377*l. 19s. 2d.* Upon arguing the same before the Lord Chancellor, they were all Over-ruled or Waved; and it was ordered, That the said Report should stand absolutely confirmed; and that the Respondent *Richard* should bring the said 201*l. 4s. ½*; and the Respondent *John* should bring the said 339*l. 3s. 7d. ½*, before Mr. Conway, the then Master (who had succeeded Mr. Orlebar) subject to further Order. And 8th March following, another Order was made by the said Lord Chancellor, That the said Mr. Conway should appoint a Receiver of the Rents and Profits of the Premises, and allow him a Salary.

Order for Receiver, 8th March 1720. The Cause was heard upon the said Report before the Master of the Rolls, (when the Respondents made Default) and it was then decreed that the said Master shou'd Compute what was due to the Appellant for the said Two Legacies of 1000*l.* and 1000*l.* and Interest from the end of one Year next after the Testator's Death, and tax the Appellant his Costs, according to the said former Decree; and that the then Defendants should bring all the Deeds and Writings relating to the Testator's Estates, before the said Master, upon Oath; and that he shou'd examine what part of the Testator's Real Estate was necessary and sufficient to be sold for raising what shou'd be found due to the Appellant for the said Legacies, Interest and Costs as aforesaid, after a Deduction of what was certified in the said Report to have been paid for the Maintenance of the Appellant's said Wife, and that the same shou'd be accordingly sold to the best Purchaser to be allowed of by the Master; and that all Parties should joyn in such Sale as the Master should direct.

Decree 15 May 1721. The Cause was heard upon the said Report before the Master of the Rolls, (when the Respondents made Default) and it was then decreed that the said Master shou'd Compute what was due to the Appellant for the said Two Legacies of 1000*l.* and 1000*l.* and Interest from the end of one Year next after the Testator's Death, and tax the Appellant his Costs, according to the said former Decree; and that the then Defendants should bring all the Deeds and Writings relating to the Testator's Estates, before the said Master, upon Oath; and that he shou'd examine what part of the Testator's Real Estate was necessary and sufficient to be sold for raising what shou'd be found due to the Appellant for the said Legacies, Interest and Costs as aforesaid, after a Deduction of what was certified in the said Report to have been paid for the Maintenance of the Appellant's said Wife, and that the same shou'd be accordingly sold to the best Purchaser to be allowed of by the Master; and that all Parties should joyn in such Sale as the Master should direct.

Order on Rehearing, 6 Nov. 1721. The Cause upon the said Report was reheard (on the Respondents Application) by the Master of the Rolls, who then confirmed the said last-mentioned Decree, with this further Direction, that a Sale should be made as well of the Testator's Leasehold Estate as of his Real Estate, sufficient to pay his Debts reported due by the said Report, or such part thereof as then remained unpaid; together with what should be found due to the Appellant for the said Legacies of 1000*l.* and 1000*l.* with Interest as aforesaid, at 5*l. per Cent.* and the Appellant's Costs of Suit.

Appeal to Lord Chancellor. The Defendants Appealed from the said two last-mentioned Decrees to the said Lord Chancellor, and the Cause standing in the Paper to be heard upon the said Appeal on the 9th of June 1722, his Lordship put it off, and recommended it to the Parties to agree Matters; and on the 30th of the same Month his Lordship again made the like Recommendation, and ordered that 200*l.* (part of the Money in the Master's Hands) should be paid to the Appellant on Account, and the same was paid accordingly. But the Parties not being able to Accommodate Matters,

Decree 18 Nov. 1723. The Cause was heard upon the said Appeal, and his Lordship was pleased to declare, that it appeared the Testator's Intent was, that his Debts and Legacies shou'd be raised out of the Yearly Rents and Profits of the said Trust-Estate, without a Sale of any part thereof; and that his Debts should be satisfied before his Legacies; and that therefore the Legacies bequeathed to the Appellant's said late





late Wife, not becoming due until after the Testator's Debts were or could be all paid out of the Yearly Rents and Profits of the Trust-Estate, and there being no Direction in the said Will for the said Legacies carrying Interest; but a Provision made for the Maintenance of the Family in the mean time; his Lordship was of Opinion, that the Appellant was not intitled to have any Interest for the said Legacies; and therefore ordered that the Appellant's Bill, so far as it sought a Sale of the Trust-Estate, or Payment of Interest for the said Legacies, shou'd stand dismissed.

But as touching Maintenance, his Lordship conceived, that the Appellant's said late Wife was intitled to her Share of what by the said Will was allowed for the Maintenance of the Family, from the time she was Maintained by the Defendant until her Death; and such Share or Proportion of the said Maintenance being then agreed (as is mentioned in the said Order) to be 30*l.* per Ann. it was ordered that the said Master shou'd see what the Appellant had received, and what was due to him in respect thereof, and that the same shou'd be paid to the Appellant accordingly.

And as to the Rents and Profits of such part of the said Trust-Estate as had been received by the said *Peter Wing* the Son, and by him mis-applied, his Lordship declared, That altho' such Misapplication ought not to charge the Trust-Estate devised to the Respondents with more than their Share of the Debts and Legacies; yet that the Appellant and his late Wife, who had been thereby Injured by not having her said Legacies raised sooner, were entitled to receive a Compensation in respect thereof out of the said *Peter* the Son's Estate; and in regard there might be a Contest between the Appellant and the other Creditors of the said *Peter* the Son, touching a Priority of Satisfaction, the Appellant's being only in the Nature of a Debt by simple Contract, his Lordship therefore ordered that the Master shou'd take an Account of the Assets of the said *Peter* come to the Hands of the Respondent *Richard* his Administrator, and also an Account of the said *Peter*'s Debts; and when the said Master shou'd have made his Report as to the said last-mentioned Assets and Debts, his Lordship would give further Directions touching the Priority of Payment of the said Debts out of the said *Peter*'s Assets, and the Interest he had in the said Trust-Estate.

And as to the Question, whether the Respondent *Richard* shou'd have an Allowance of Interest for what he had borrowed or paid out of his Pocket towards Satisfaction of his Father's Debts, his Lordship declared, that the said Respondent had done well therein, he having therewith discharged Debts which carried Interest, and the Estate profited thereby; and therefore ordered that out of the Rents of the said Estate he shou'd be allowed Interest for what he so borrowed, or paid out of his Pocket in satisfaction of his said Father's Debts; and that the Money by him brought before the said Master as aforesaid shou'd be repaid him.

And as touching the Costs of the Suit, his Lordship declared, he saw no Cause to give the Appellant any Costs, but that the Respondent *Richard* ought to be allowed his Costs out of the said Trust-Estate in the first Place, and that the Surplus of the said Trust-Estate should be applied in the Payment of the Debts, and then the Legacies of the said *Peter* the Father as aforesaid; but in regard the Allowance of the said Defendant's Costs would occasion a longer Continuance of the said Term to the Appellant's and Respondents Prejudice, his Lordship therefore reserved the Consideration, whether the Respondents should have Satisfaction over against the Appellant in respect of their Costs.

And as to the 1000*l.* given to the Appellant's said late Wife out of the personal Estate, his Lordship declared, the Appellant ought to have Satisfaction for the same, in like manner as he was to have the 1000*l.* charged on the Trust-Estate: And it was further ordered, that the Receiver of the Rents and Profits of the said Trust-Estate should be discharged, (the Appellant then declining to bear the Charge of a Receiver for the future) and the Consideration, who should bear the Charge of the said Receiver for the Time past was thereby reserved. Since the pronouncing of which Decree, the said Defendant *Mary Wing* is dead, and several Proceedings have been before the Master in relation to the said Account.

*Appeal.* The Appellant conceives himself aggrieved by the said last-mentioned Decree, and has appealed therefrom, and from all subsequent Proceedings grounded thereon, to your Lordships, and humbly hopes that the same shall be reversed, for the following Reasons amongst others, viz.

*First,* For that a Legacy given, without mentioning the Time of Payment, is according to the known Rule of a Court of Equity in ordinary Cases to be paid at the End of a Year after the Death of the Testator, and to carry Interest from that Time; and where it is directed to be rais'd out of the Rents and Profits of an Estate, such Direction is generally held to give a Power to sell or mortgage the Estate for that Purpose, and especially in the Case of younger Childrens Portions, when it becomes necessary to raise them for their Advancement in the World: And if it should be thought that it was not the Testator's Intent in the present Case to have the Legacies in Question raised by Sale or Mortgage, yet it is humbly conceived, that as there is no Time limited for the Payment of the first 1000*l.* nor the Payment of it postpon'd by the Will, it ought not to have waited till the Payment of the Debts, but be rais'd as soon as the Profits would supply it, by which Means equal Justice would be done both to the Creditors and the Legatee. The 1000*l.* might be raised in a reasonable Time, from whence it ought to carry Interest, and the Creditors would not be prejudiced, because their Debts would carry Interest, and must in the End be paid out of the Estate. And it is the Stronger, because of the express Direction in the Will, to pay the Rents and Profits to the Appellant's late Wife towards satisfying her Legacy. And as to the other 1000*l.* Legacy, which is more particularly mentioned to be payable out of the personal Assets, as that has been postpon'd by the Payment of those Assets to the Creditors, it ought to stand in the Place of the Debts so paid, in order to its being satisfied out of the real Estate, and to carry the same Interest as they did in the mean time.

*Secondly,* For that, if both or either of the Legacies ought to have been postpon'd to the Debts, it appears by the Master's Report, that the Debts might have been paid much sooner than the Time of making the last Decree, if the 262*5* *l.* receiv'd by *Peter* the Son, so long ago as the Year 1711, had been applied to that Purpose, according to the Directions of the Will; and considering how much Interest might have been saved out of the Debts that would have been paid off by that Money, upon the nearest Computation, the whole Debts might have been paid before the Year 1718; and therefore, if any Variation of the Master of the *Rolls* Decree had been reasonable, as to the Time of Payment of the Legacies, it ought to have been by referring it to a Master, to state when the Debts might have been paid, and ordering the Legacies to carry Interest from that Time, and to be paid by the Respondents, so far as they had receiv'd any Overplus of the Rents and Profits; and as to the Residue by Sale or Mortgage of the Trust-Estate, or at least of that Part of it which was devised to *Peter* the Son, and the



the Allowance of an annual Sum in lieu of Maintenance, ought to have been continued to the Time of the Commencement of the Interest.

*Thirdly,* For that it is humbly conceived, the Respondent *Richard* ought not to be allowed (as against the Appellant) Interest for the Money he advanced towards Payment of his Father's Debts, because there was sufficient rais'd out of the Rents to pay the Principal; and if that was misapplied, it ought not to Prejudice the Appellant, and postpone the Payment of his late Wife's Legacy; nor could there be regularly any such Allowance ordered upon hearing the said Appeal, the same Matter having been before determined on the Exceptions to the Master's Report.

*Fourthly,* For that it is apprehended, there was no Foundation to discharge the Receiver, since in all Events the Appellant is intitled to have the Legacies out of the Profits of the Trust-Estates, and by the express Directions of the Will, the Respondents and *Peter Wing* the Younger were not to enter upon the said Estates till those Legacies, as well as the Debts, are satisfied: And the rather, because in this Case the last Decree doth not so much as order the Respondents to apply the growing Rents either to the Payment of the Debts or the Appellant's Legacies, or in what other manner or by whom the same shall be disposed of. And the Appellant humbly apprehends there was no Reason why he should bear the Expence of the Receiver, nor could his Refusal therefore to bear such Expence be a sufficient Ground to discharge such Receiver, nor doth there appear to have been any Reason for reserving the Consideration of who should bear the Expence of the Receiver for the Time past.

*Fifthly,* For that the Appellant ought not to have been deprived of his Costs, which he is advised by the common Course of a Court of Equity he is entitled to, as his Suit was made necessary by the Nature of the Devise, and by the Misconduct of one, at least, of those who was entitled to Part of the Estate, out of which he was to receive a Satisfaction for his just Demand; much less could there be any Reason for reserving the Consideration, whether the Respondents should have Satisfaction over against the Appellant in respect of their Costs. And it is humbly apprehended, that the Question as to Costs was not then open for the Determination of the Court, because the same were given by the first Decree at the *Rolls*, which was signed and inroll'd long before the Appeal to the Lord Chancellor from the second Decree made at the *Rolls* upon the Master's Report, and therefore could not be brought before the Court upon such Appeal; nor did the Respondents, by their Petition of Appeal, complain of that Part of the Order, or pray their own Costs against the Appellant.

*For which Reasons, among others, the Appellant humbly hopes the Decree of the Lord Chancellor, and the subsequent Proceedings grounded thereon, shall be reversed, and the second Decree of the Master of the Rolls be confirmed, or such other Directions given therein as shall be just.*

C. TALBOT.  
D. RYDER.

Alexander Small, Appellant.  
Richard Wing, } Respondents.  
and Others, }  
The APPELLANT'S Cafe.  
To be heard at the Bar of the House  
of Lords, on *Friday* the 10<sup>th</sup>  
Day of *April* 1730.



